STATE OF MICHIGAN

COURT OF APPEALS

ROSA MILOSEVSKI, Plaintiff-Appellee,	UNPUBLISHED February 5, 2004
v	No. 243391 Wayne Circuit Court
RANDAZO'S FRUIT MARKET 2, INC., Defendant-Appellant.	LC No. 01-128244-NI

Before: Fort Hood, P.J., and Bandstra and Meter, JJ.

PER CURIAM.

Defendant Randazo's Fruit Market appeals by leave granted the trial court's order denying its motion for summary disposition in this premises liability action. We reverse.

I. Basic Facts and Procedural History

This case arises from a slip and fall accident at defendant's store. The facts surrounding the accident, in which plaintiff Rosa Milosevski was injured, are not reasonably disputed by the parties.

On April 13, 2001, plaintiff and her husband arrived at defendant's store at approximately 10:00 a.m. The two completed their shopping approximately one-half hour later, then proceeded to the checkout counter. While waiting in line, plaintiff realized that she had forgotten to pick up spinach and left her husband at the checkout counter to return to the produce section of the store. As plaintiff approached the spinach display she slipped and fell after stepping onto an accumulation of corn husks and silks that had been dropped to the floor from a corn display located directly across the aisle from the spinach. At her deposition, plaintiff described the debris on which she slipped as being "everywhere," and testified that although there was nothing preventing her from seeing the debris before she fell, she was not paying attention to the floor because she was focused on the spinach and was in a hurry to return to the

checkout counter.[1] Plaintiff also testified that after falling she noticed that the floor underneath the husks and silks, which she indicated were piled at least two inches thick, was somewhat wet.

On August 15, 2001, plaintiff filed the instant suit against defendant. In her complaint, plaintiff alleged that by permitting the husks and silks to accumulate on the wet floor defendant negligently breached its duty to keep its premises in a reasonably safe condition. Defendant thereafter sought summary disposition pursuant to MCR 2.116(C)(8) and (10), arguing that the open and obvious nature of the debris on which plaintiff slipped relieved it of any duty to protect plaintiff from that condition. See *Lugo v Ameritech Corp, Inc*, 464 Mich 512; 629 NW2d 384 (2001). In response, plaintiff asserted that because the husks and silks hid the increased danger created by the wet floor, the open and obvious nature of the debris itself did not relieve defendant of its duty to maintain its premises in a reasonably safe condition. More specifically, plaintiff argued that the water beneath the debris constituted a special aspect of danger not readily apparent to the casual observer, which rendered that debris unreasonably dangerous despite its open and obvious nature. See *Bertrand v Alan Ford, Inc*, 449 Mich 606; 537 NW2d 185 (1995). Concluding that the "water under the hazardous condition even on reasonable inspection would not be seen," the trial court agreed with plaintiff and denied defendant summary disposition. Defendant thereafter sought leave to appeal the trial court's decision, which this Court granted.

On appeal, the parties reiterate their arguments made below.[2] As explained *infra*, we conclude that the trial court erred in failing to grant summary disposition in favor of defendant.

II. Analysis

A. Standard of Review

We review de novo a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Although defendant's

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[1] Plaintiff initially testified that she saw the debris before she fell, but "wasn't paying any attention to it . . . ." However, when asked whether she made any effort to avoid walking on the debris, plaintiff indicated that it was not until after falling that she "realized what was there."

[2] Plaintiff also argues that the "analytical framework" established by our Supreme Court in *Lugo*, *supra*, which permits summary disposition upon judicial determination whether a "special aspect" of an open and obvious hazard does not render that hazard unreasonably dangerous unconstitutionally deprives plaintiffs of due process by denying plaintiffs the right to have a jury decide the reasonableness of a premises owner's conduct. However, we decline to address this argument. As plaintiff concedes, having not been raised below, this issue is not preserved for our review. See *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999) (issues not raised before and decided by the trial court are not preserved for appeal). Moreover, plaintiff's argument in this regard exceeds the scope of review permitted by our order granting leave to appeal, which limits the issues on appeal to those "raised in the application and supporting brief." In any event, we are required by stare decisis to follow decisions of our Supreme Court. See *People v Hall*, 249 Mich App 262, 270; 643 NW2d 253 (2002).

motion was based on MCR 2.116(C)(8) and (10), we analyze the motion under MCR 2.116(C)(10) because the record indicates the trial court reviewed matters outside the pleadings. *Id*. at 338. In reviewing a motion for summary disposition under MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted in a light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists. *Ritchie-Gamester v Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). All reasonable inferences are resolved in the nonmoving party's favor. *Hampton v Waste Mgt of Michigan, Inc*, 236 Mich App 598, 602; 601 NW2d 172 (1999).

B. Premises Owner's Duty to Invitee: Open and Obvious Dangers

"In general, a premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo, supra* at 516. However, this duty does not typically include the removal of dangers that are open and obvious. *Id*. A condition is open and obvious if it is reasonable to expect an average person of ordinary intelligence to discover the danger upon casual inspection. *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 10; 574 NW2d 591 (1997). However, if special aspects of a condition make even an open and obvious risk unreasonably dangerous, a possessor of land must take reasonable precautions to protect an invitee from that risk. *Lugo, supra* at 517-519.

Plaintiff here does not contest the open and obvious nature of the husks and silks that had accumulated on the store's floor. Rather, plaintiff argues, as she did below, that the water beneath that debris constituted a special aspect of danger not readily apparent to the casual observer, which rendered the debris unreasonably dangerous despite its open and obvious nature. We disagree.

In *Lugo, supra* at 519, our Supreme Court indicated that "only those special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove the condition from the open and obvious danger doctrine." As examples of such aspects, the Court cited open and obvious hazards that (1) are "effectively unavoidable," such as an open hazard at the only exit from a commercial building, or (2) pose an unreasonably high risk of severe harm, such as "an unguarded thirty foot deep pit in the middle of a parking lot." *Id*. at 518.

In the present case, there was no evidence that an unreasonably high risk of severe harm existed. The danger plaintiff alleged[3] was that of slipping and falling due to the wet condition of

[3] Plaintiff's deposition illustrates that, in fact, the fall here probably did not result from the wet floor, apart from the corn husks and silks. Plaintiff admitted that she was in a hurry at the time of the accident, was focused on the spinach and was not paying attention to the floor or the corn debris. The inference to be drawn from plaintiff's testimony is that the accident would likely have occurred even if the floor was not wet, i.e., that it resulted from plaintiff's failure to notice and take appropriate cautions regarding the debris. In other words, the debris itself was certainly open and obvious and, had plaintiff taken appropriate caution upon noticing that, the accident would likely not have occurred even though the floor was wet.

the floor beneath the husks and silks. The risk of injury presented by this hazard is not unlike that found in *Joyce v Rubin*, 249 Mich App 231, 242-243; 642 NW2d 360 (2002), where this Court held that a layer of snow on a sidewalk does not constitute a unique danger creating the "risk of death or severe injury" necessary under *Lugo* to impose possessor liability for such an open and obvious danger. Similarly, falling several feet down ice-coated stairs has been held not to meet the *Lugo* standard. See *Corey v Davenport College of Business*, 251 Mich App 1, 6-7; 649 NW2d 392 (2002). Therefore, if the grant of summary disposition is to be upheld, there must be a question of material fact regarding whether the danger at issue here was avoidable. We find no such question under the facts of this case.

Plaintiff contends that "[t]here were so many husks on the floor that [she] could not avoid them in her attempt to find and then purchase the spinach." However, the circumstances presented here are readily distinguishable from the example of an "effectively unavoidable" hazard provided by the Court in *Lugo*, i.e., a patron unable to leave a commercial building because a dangerous condition blocks the only exit.

This Court addressed a similar situation in *Joyce*, *supra* at 242. There, the plaintiff slipped on the sidewalk while entering the home of her former employer to remove some of her personal belongings. *Id*. at 233. Although the plaintiff there argued that she had no choice but to cross the snowy walkway in order to remove her belongings, this Court found that "Joyce could have simply removed her personal items another day." *Id*. at 242. "[U]nlike the example in *Lugo*, Joyce was not effectively trapped inside a building so that she *must* encounter the open and obvious condition in order to get out." *Id*. (Emphasis in Original).

The holding in *Joyce* is instructive here. Despite the open invitation to do business with defendant, plaintiff was not forced to encounter the open and obvious hazard between the spinach and corn displays. Even if no safe path to the spinach display existed that day, plaintiff could have foregone the purchase of spinach, requested that the debris be cleared away or proceeded to another retailer. As in *Joyce*, "no reasonable juror could conclude that the aspects of the condition were so unavoidable that [she] was effectively forced to encounter the condition." *Id*. at 242-243.

We reverse.

/s/ Karen Fort Hood
/s/ Richard A. Bandstra
/s/ Patrick M. Meter